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Nos. 83-1171 and 83-1173

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

EXXON CORPORATION, et al.,
Petitioners,

vs.

INTERSTATE NATURAL GAS ASSOCIATION
OF AMERICA, et al.,
Respondents.

FEDERAL ENERGY REGULATORY COMMISSION,
Petitioner,

v.

INTERSTATE NATURAL GAS ASSOCIATION
OF AMERICA, et al.,
Respondents.

On Petitions For A Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

BRIEF FOR LACLEDE GAS COMPANY IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that the Natural Gas Policy Act of 1978 ("NGPA"), 15 U.S.C. §§ 3301. *et seq.*, did not allow the Federal Energy Regulatory Commission to raise the wellhead price of natural gas above Congressionally established maximum ceiling prices by adopting a standard for the measurement of Btu content which was different from the one in effect when Congress passed the NGPA.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-31a)[1] is reported at 716 F.2d 1. The orders of the Federal Energy Regulatory Commission (Pet. App. 32a-5a, 51a-86a, 87a-92a) are published at 45 Fed. Reg. 49077, 46 Fed. Reg. 24537, and 47 Fed. Reg. 614, respectively.

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[1] "Pet. App." references are to the appendices to the Petition in No. 1173.

JURISDICTION

The judgment of the court of appeals (Pet. App. 93a-98a) was entered on August 9, 1983. Petitions for rehearing were denied on October 19, 1983 (Pet. App., 99a-100a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 15 U.S.C. 3416(a)(4).

STATUTE AND REGULATION INVOLVED

The relevant statutes include the Natural Gas Policy Act of 1978, 15 U.S.C. §§ 3301-3432 (Supp V 1981); the Natural Gas Act, 15 U.S.C. §§ 717a-717r; and the Administrative Procedure Act, 5 U.S.C. §§ 551-559. In addition to the statutes and regulations set out in Pet. App. G, we have set forth in the Appendix, infra, Section 502(a) and 502(b) of the Natural Gas Policy Act, and the Administrative Procedure Act, 5 U.S.C. § 553(b)(3) and § 553(c).

STATEMENT

The orders of the Federal Energy Regulatory Commission[2] vacated by the court below promulgated the so-called "Btu measurement rule," 18 C.F.R. § 270.204, which prescribes the manner in which the energy content of a given volume of natural gas, measured in British thermal units ("Btu's"), is to be determined for purposes of applying maximum ceiling prices under the Natural Gas Policy Act of 1978 ("NGPA"), 15 U.S.C. §§ 3301-3432.

Prior to December 1, 1978, the date the NGPA became effective, the maximum lawful prices for natural gas were expressed in volumetric units (thousands of cubic feet, or "Mcf's"). Recognizing, however, that all Mcf's of gas do not have the

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[2] Both the Federal Energy Regulatory Commission and its predecessor agency, the Federal Power Commission are referred to herein as the "Commission."

same energy content, the Commission included in most of its area and national rate orders, a proportional adjustment of the presecribed maximum lawful price, depending on whether the actual Btu content was greater or less than a prescribed base level. To determine the number of Btu's in a given volume of gas, the Commission adopted the so-called water-vapor-saturated standard (or "wet" method). *See* 18 C.F.R. § 2.56a(c)(1), 2.56b(d)(1). *See also Permian Basin II Area Rate Proceeding,* 50 F.P.C. 390, 403 (1973); *Other Southwest Area Rate Proceeding,* 46 F.P.C. 900, 924-25(1971); *Texas Gulf Coast Area Rate Proceeding,* 45 F.P.C. 674, 719 (1971); *Southern Louisiana Area Rate Proceeding,* 40 F.P.C. 530, 649 (1968). This standard was based on a wide-spread industry practice and has long been the basis used by the American Society for Testing Materials. *See Texaco, Inc.,* 33 F.P.C. 1228, 1236-37 (1965).

On November 15, 1978, shortly after the enactment of the NGPA, the Commission published proposed interim regulations implementing the Act (43 Fed. Reg. 53,270). Included within these regulations was a rule on Btu measurement which was in critical parts identical to the pre-NGPA Btu measurement rule. The preamble to the proposed interim rule described this provision as providing the "technical information" necessary to make the conversion, required by the pricing scheme of the NGPA, from volumetric units to Btu's (43 Fed. Reg. at 53,280). That technical information included the prior practice under the Natural Gas Act ("NGA") of converting the gas to water-vapor saturated conditions. The industry accordingly believed that the pre-NGPA practice of Btu measurement on a water-vapor-saturated basis, was being continued by the Commission. No comments were received on the proposed rule during the comment period and, on November 29, 1978, the identical text of the proposed rule was adopted exactly as proposed. The preamble to the regulations did not even mention the rule. *See* 43 Fed. Reg. 56,448 (December 1, 1978).

As a matter of fact, there is ample reason to believe the Commission shifted its course in midstream. After the interim regulations were adopted on November 29, 1978, the producers, which are the petitioners here, filed comments in which they accepted the interpretation that the interim regulations promulgated by the Commission adopted the "wet rule" (Pet. App. 11a) and after the 60 day comment period with respect to such regulations expired these same producers in February 1979 filed a petition for rehearing on that account. In April 1979, the Commission denied such application. If the Commission agreed with the producers' contention that the "dry rule" was the rule which it had promulgated, it did not say so in denying the application for rehearing. It appears that the Commission itself did not in November 1978 or even in April 1979 intend the interpretation it claimed it meant when for the first time in July 1980, it expressed that interpretation stating that interim regulation called for the "dry rule" interpretation.

As stated, on July 16, 1980, more than eighteen months after the interim regulation had been promulgated, the Commission promulgated the interpretation of the rule at issue here. Order No. 93, 45 Fed. Reg. 49,077 (July 23, 1980). The rule was issued as a final not as a proposed rule. The Order No. 93 rule differed from the interim final rule only in structure and format; it appeared in substance to be the same water-vapor-saturated rule that had been in effect under the NGA. However, in the preamble to Order No. 93, the Commission announced that, despite the explicit language of the interim rule, that rule "merely describes the test standard" for measuring Btu content. The results obtained under test conditions, the Commission said, must be "converted" to figures that reflect the actual water vapor conditions of natural gas on delivery (Pet. App., p. 43a). This interpretation of the interim rule was directly contradictory to that which was understood by the entire gas industry and to that which appears to have been intended by the Commission when it promulgated the interim regulation.

In Order No. 93-A (Pet. App., 51a-86a), issued April 24, 1981, nine months after Order No. 93, the Commission for the first time attempted to articulate a rationale for its already-established rule. In addition to characterizing Order No. 93 as "but a clarification of the interim rule" the Commission applied the rule retroactively to all first sales of natural gas made on or after December 1, 1978, the effective date of the interim rule (Pet. App., 73a).

In vacating Order Nos. 93 and 93-A, the court of appeals ruled that the FERC's adoption of the so-called "dry" rule was inconsistent with the pricing provisions of the NGPA as wll as the Congressional intent. it accordingly refused to defer to the Commission's rationale for the dry rule. (Pet. App., 30a). Because the court of appeals found the dry rule "not in accordance with law," it did not reach other issues raised by petitioners below. These included: whether the rule had been promulgated with sufficient notice and opportunity to comment; whether the rule had been improperly given retroactive.effect; or whether the Commission improperly failed to guarantee pipelines and distribution companies automatic pass through of any retroactive payments (*id.*).

SUMMARY OF REASONS FOR DENYING THE PETITIONS

This is not a case, as petitioners claim, in which the court of appeals properly should have deferred to the Commission. "Even according the Commission's rationale for the dry rule the respect traditionally due an agency's statutory interpretaion," the court of appeals said, "we find the Commission's dry rule . . to be fundamentally at odds with the Btu measurement technique implicit in the NGPA" (Pet. App., 30a). Having amply supported this finding, the precedents of this Court establish that the court of appeals need not defer to the administrative agency.

Nor does this case involve "an important question of federal law" (Supreme Court Rule 17). Significantly, petitioners do not argue that the court of appeals' decision will adversely impact the Commission's work under the NGPA. The fact is that it will have a positive impact. The Commission is now battling what it perceives to be a serious erosion of natural gas markets which it readily admits results in major part from natural gas prices which are too high. The court of appeals' decision results in *lower* natural gas prices. Hence, that decision cannot adversely impact implementation of the NGPA. It aids the work of the Commission.

Whether or not the Commission's interpretation of the NGPA is correct, its newly promulgated dry rule is void *ab initio*. The Commission's abandonment of its long-standing practice of using a water-vapor-saturated standard is riddled with not-yet-addressed (but raised below) violations of procedural due process. Most importantly, in promulgating its new dry rule, the Commission failed to provide interested parties adequate notice and opportunity to comment. This failure contravenes Section 502 of the NGPA, 15 U.S.C. § 3412, and the Administrative Procedure Act, 5 U.S.C. § 553.

REASONS FOR DENYING THE PETITION

I. The Court Of Appeals Properly Did Not Defer To The Commission's Unreasonable Interpretation Of The NGPA.

The Government's and the Producers' principal contention appears to be that the court of appeals should have deferred to the Commission's construction of the NGPA (FERC Br., 11; Exxon Br., 12-13). But, the court of appeals need not—indeed must not—defer to a regulatory agency's construction when it plainly has no support in the statute. As this Court recently observed, "this general principle of deference, while fundamental, only sets 'the framework for judicial analysis; it does not displace it.' " *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 24 (1982), *quoting United States v. Cartwright*, 411 U.S. 546, 550 (1973).

In the instant case, the court of appeals gave the Commission all the deference it deserved as a regulatory body. The Commission's adoption of the "dry" rule is plainly out of step with the Btu measurement technique implicit in the NGPA. While petitioners base their argument on the precision that Congress used in establishing maximum ceiling prices under the NGPA (FERC Br., 11; Exxon Br., 16-17), it is precisely that meticulous care that undermines petitioners' position. At the time the Congress passed the NGPA, Btu content had been measured by the Commission on a "wet" basis for over fifteen years. That being so, as the court of appeals held (Pet. App., 24a), in the absence of clear Congressional intent to the contrary, it is most illogical to assume that Congress intended to shift to some other rule.

A contrary result is not required, as petitioners' urge (FERC Br., 11; Exxon Br., 16-17), by the fact that Congress established maximum ceiling prices "per MMbtu" rather than "per Mcf" as had been the Commission's practice in setting maximum lawful prices under the NGA. It simply takes too great a leap to conclude from this shift that Congress also intended to abandon

the "wet" rule. Indeed, as the court of appeals found (Pet. App., 25a-26a), there is considerable evidence that Congress assumed the "Mcf" and MMBtu" commodity units to be equivalent.[3]

The Producers' reliance on *Public Service Commission v. Mid-Louisiana Gas Company,* Nos. 81-1889 *et al.* (June 28, 1983), as precedent for their position, is entirely misplaced. There, refusing to defer to the Commission's interpretation of the NGPA that Congress implicitly intended to exempt pipeline production from an otherwise comprehensive regulatory scheme, this Court held that the Commission's position was contrary to the history, structure and basic philosophy of the NGPA. That holding is equally valid here.

The court of appeals, accordingly, properly refused to defer to the Commission's construction of the statute. The courts are the final authorities on issues of statutory construction. They are not required "to stand aside and rubber-stamp" agency decisions that are inconsistent with the statutory mandate or frustrate Congressional policy. *Securities and Exchange Commission v. Sloan,* 436 U.S. 103, 118 (1978) (quoting *NLRB v. Brown,* 380 U.S 278, 291 (1965) and *Volkswagenwerk v. FMC,* 390 U.S. 261, 272 (1968); *Public Service Commission v. Mid-Louisiana Gas Co., supra.*

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[3] Petitioners ignore the court of appeals inescapable logic that the initial NGPA price for Section 102 gas of $1.75/MMBtu was identical to the price that President Carter proposed, 1.75/Mcf, and that the NGPA initial price for Section 106 gas was set at 54¢/Mcf, the price established by the Commission for such gas under the just and reasonable mandates of the NGA (Pet. App., 26a). Moreover the inter-fuel Btu comparisons made in other statutory provisions enacted contemporaneously with Title I of the NGPA suggest that Congress was apparently willing to use standard conversion factors (see Pet. App., 28a).

II. The Work of the Commission Will Not Be Adversely Impacted By the Court of Appeals Decision.

While the Government asserts that a question of "fundamental importance" to the Commission's implementation of the NGPA is presented (FERC Br., 10), importantly, neither the Government nor the Producers claim that the court of appeals' decision will have an adverse impact on the Commission's implementation of the NGPA. Nor can they. One of the most serious problems confronting the natural gas industry today—according to the Commission—is over-supply. Faced with a softening of consumer demand and with alternate fuel prices which are lower than the price of natural gas, the industry is undergoing a serious erosion of natural gas markets. *See* e.g. *Tennessee Gas Pipe Line Company,* Docket No. CP82-502-000, application filed September 8, 1983 [applicant shows a daily surplus of 100% and annual surplus of 65%]; and *United Gas Pipeline Company,* Docket No. CP83-397-000, application filed June 30, 1983 [applicant estimates a drop in sales level to 500 Bcf from over 1,000 Bcf in 1981]. And, the Commission last December, said nothing "in recently available data evidences that an end to the current surplus is imminent." *Transcontinental Gas Pipeline Corporation,* Docket No. CP80-485-000 (December 22, 1983), 25 FERC ¶ 61,418 at 61,397. The Commission attributes the cause of these problems in part to the large increases in the price of natural gas which followed passage of the NGPA. *See e.g. Transcontinental Gas Pipe Line Corporation, supra.*[4]

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[4] To aid market-ordering, the Commission has approved a number of special marketing programs which are intended to help reduce the price of gas and relieve the pressures of over-supply. *See e. g. Tenneco Oil Company,* Docket No. CI83-269-000 (November 10, 1983), 25 FERC ¶ 61,234; *Transcontinental Gas Pipe Line Corp.,* Docket Nos. RP83-11-000 and RP83-30-000 (November 10, 1983), 25 FERC ¶ 61,219; and *Columbia Gas Transmission Company,* Docket No. CP83-452-000 (November 10, 1983), 25 FERC ¶ 61,220. In approving these special programs, the Commission took notice of "the surplus in

The court of appeals' decision will help—not hinder—the Commission in its quest for a solution to the industry's marketing problems. That decision produces lower natural gas prices and will make natural gas prices more competitive with alternate fuels. Hence, rather than having an adverse impact on the Commission's implementation of the NGPA, the court of appeals' decision will have a positive impact.

If there is any validity—and we do not agree that there is—to the Government's alternative argument that the Congress left the matter to the interpretation of the Commission (FERC Br., 18), the Commission's exercise of that discretion in adopting the dry rule is clearly an abdication of its primary responsibility. Under its statutory mandate contained in the NGA, the Commission is charged with the responsibility of protecting consumers "against exploitation at the hands of natural gas companies." *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 610 (1944). The NGA was passed—this Court said—"to afford consumers [not natural gas producers] a complete, permanent and effective bond of protection from excessive rates and charges." *Atlantic Refining Co. v. Public Service Commission*, 360 U.S. 378, 388 (1959). The Commission's use of—or its discretion to adopt—a rule which *raises* natural gas prices clearly stands this policy on its head. Indeed, the Commission's insistence on vindication of its inflationary dry rule when "the average natural gas price has overshot competitive, market-

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the market; the general decline in gas sales; the high price of gas which was contributing to erosion of traditional markets and prevented attachment of new markets; the fact that prices had not responded quickly to market pressure; and the increase in take-or-pay exposure faced by many pipelines." *Tenneco Oil Company*, Docket No. CI83-269-000 (slip op, 2) (order on rehearing, January 16, 1984). "[S]urplus problems," the Commission said, "have ... reached critical proportions and require immediate attention. Take-or-pay liability of the interstate pipelines has risen to unprecedented levels" (*id.* at 10).

clearing levels in many regions"[5] of the country, is puzzling to say the least.

Under these circumstances, further review by this Court is unwarranted.

III. Whether Or Not The Commission's Interpretation Is Correct, Its Btu Rule Is Void Ab Initio Because Of Violations Of Procedural Due Process.

In implementing the NGPA by rulemaking, the Commission is required by statute to provide interested persons with notice and prior opportunity to comment both in writing and, to the extent practicable, orally. 15 U.S.C. § 3412; 5 U.S.C. § 553 (b), (c). In the instant case, the Commission did not obey this mandate. Neither the proposed interim nor the final interim rules advised interested parties that the Commission was considering a change in its historical practice of measuring Btu content on a standard, water-vapor-saturated basis. It was not until the Commission issued its final rule in Order No. 93 that it first indicated that a reversal of prior practice had been under consideration. And, to compound its procedural errors, the Commission in the same order applied the new rule retroactively to December 1, 1978.[6]

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[5] Statement of Policy on Off-System Sales, 23 FERC ¶ 61,140 at 61309 (April 25, 1983)(concurring opinion of Chairman Butler).

[6] In addition to these procedural errors, the Commision also erred in failing to guarantee pipeline and distribution companies automatic pass through of any retroactive payment. This failure violates Section 601 of the NGPA, 15 U.S.C. §§ 3431 (c) (Supp. III 1979). Because the court of appeals found the Commission's rule "not in accordance with law," it did not reach this issue.

It is settled under the Administrative Procedure Act that an administrative agency must provide prior and specific notice (in a concrete and focused form) of its proposed actions in order to invite meaningful public comment. *See e.g. National Tour Brokers Ass'n v. United States,* 591 F. 2d 896 (D.C. Cir. 1978); *Home Box Office Inc. v. Federal Communications Commission,* 567 F.2d 9 (D.C. Cir.), certiorari denied, 403 U.S. 923 (1971). That notice must be even more specific when, as here, the agency departs from long-standing industry and agency practices, and adopts a rule which even it knows has a different meaning than anybody else thought it had. In such event, the agency must give specific notice that the standard is being changed. *Greater Boston Television Corp. v. Federal Communication Commission,* 444 F. 2d 841 (D.C. Cir.), certiorari denied, 403 U.S. 923 (1971). And, the agency may apply the changed standard only to those actions taken by parties after the new standard has been proclaimed as in effect. *Boston Edison Co. v. Federal Power Commission,* 557 F. 2d 845 (D.C. Cir.), certiorari denied sub nom. *Norwood v. Boston Edison Co.,* 434 U.S. 956 (1977).

Hence, whether or not the Commission's interpretation of the NGPA is correct, since the Commission failed to provide the requisite notice and opportunity for public comment, its order has to be found void *ab initio.*

CONCLUSION

For the reasons stated, the petitions for a writ of certiorari should be denied.

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APPENDIX

APPENDIX

Section 502(a), Natural Gas Policy Act

> ADMINISTRATIVE PROCEDURE ACT.—Subject to subsection (b), the provisions of subchapter II of chapter 5 of title 5, United States Code [the APA], shall apply to any rule or order issued under this Act having the applicability and effect of a rule as defined in section 551(4) of title 5, United States Code; except that sections 554, 556, and 557 of such title 5 shall not apply to any order under section 301, 302, or 303.

See 15 U.S.C. § 3412(a).

Section 502(b), Natural Gas Policy Act

> OPPORTUNITY FOR ORAL PRESENTATIONS.—To the maximum extent practicable, an opportunity for oral presentation of data, views, and arguments shall be afforded with respect to any proposed rule or order described in subsection (a) (other than an order under section 301, 302, or 303). To the maximum extent practicable, such opportunity shall be afforded before the effective date of such rule or order. Such opportunity shall be afforded no later than 30 days after such date in the case of a waiver of the entire comment period under section 553(d)(3) of title 5, United States Code, and no later than 45 days after such date in all other cases. A transcript shall be made of any such oral presentation.

See 15 U.S.C. § 3412(b).

Administrative Procedure Act

5 U.S.C. § 553(b)(3).

> General notice of proposed rulemaking shall . . . include . . . either the terms or substance of the proposed rule or a description of the subjects and issues involved....

5 U.S.C. § 553(c).

> After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose....